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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/522,322

03/16/2005

Christina Lutz

CU-4060 BWH

8831

26530 7590 03/04/2010  
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EXAMINER

CHAWLA, JYOTI

ART UNIT

PAPER NUMBER

1794

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/522,322	<b>Applicant(s)</b> LUTZ ET AL.	
	<b>Examiner</b> JYOTI CHAWLA	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 23 December 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 33-63 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 33-63 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |                                                                                      |                                                                   |
|--------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____                                                          | 6) <input type="checkbox"/> Other: _____                          |

### DETAILED ACTION

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/23/2009 has been entered. Claims 33-40 and 61-63 have been amended. Claims 33-63 are pending and examined in the current application.

### *Claim Objections*

#### Duplicate claim Objection:

When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k).

Claim 33 recites "A confectionery article in non liquid form based on herbal mixtures, where the herbal mixtures consist of an extract of a mixture of herbs and an extract of *Stevia rebaudiana* wherein the herbs are peppermint, sage, yarrow and thyme"(emphasis added)

Claim 34 recites "A confectionery article in non liquid form based on herbal mixtures, where the herbal mixtures consist of a mixture of herb extracts and an extract of *Stevia rebaudiana* wherein the herbs are peppermint, sage, yarrow and thyme" (emphasis added)

Thus the claims differ from each other only in the recitation of "an extract of a mixture of herbs" (as recited in claim 33) "a mixture of herb extracts" (as recited in claim 34), which are referred to as equivalents, throughout applicant's disclosure (see specifically, publication of application paragraphs[0001], [0012-0013],[0016]). Further applicants' remarks dated 5/22/2009, page 7, lines 20-24 also clarify that the phrases are

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equivalents by stating that “the terms “an extract of a mixture of herbs” and a “mixture of herb extract” may indeed be deemed being in some way or the other equivalent”. Based on this claim 33 and 34 are being deemed as substantial duplicates of each other and , claim 34 is objected to under 37 CFR 1.75 as being a substantial duplicate of claims 33.

Similarly claim 36 is objected to under 37 CFR 1.75 as being a substantial duplicate of claims 35 for the same reasons as stated above regarding claims 33 and 34.

Additionally claims 38, 40, 42, 44, 46, 48 and 62 (which depend from claims 33 to 36 respectively) are also objected to under 37 CFR 1.75 as being a substantial duplicate of claims 37, 39, 41, 43, 45, 47 respectively for the same reasons as stated above regarding objection of claims 33 and 34.

Claims 49 through 52, are substantial duplicate claims, similarly claims 53 through 56 are substantial duplicate claims, claims 57-60 are substantial duplicate claims, and claims 61-63 are substantial duplicate claims for the same reasons as stated above regarding objection of claims 33 and 34.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 33-60 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 33-36 and their dependent claims 37-60 recite the phrase “ a confectionery article...based on ...” which renders the claims indefinite. The metes and bounds of transitional phrase “based on”, as recited in the claims are unclear and neither the claims nor the specification clarify the phrase. It is not clear whether the confectionery

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article as claimed comprises of herb extracts/extract or herbs and extract of stevia rebaudiana among other ingredients, such as sugars, flavors colors etc.; or the invention as claimed consists of herb extracts/extract or herbs and extract of stevia rebaudiana only. Further, applicants' attention is directed to dependent claims recite molded, stamped, compressed, chewable confections, including chewing gums which all directly or indirectly depend from claims 33-36 and it is unclear whether any or all of these confectionery articles require additional ingredients or components. Correction and/or clarification is required.

Claims 37-40 and their dependent claims 43-46, 51-52, 55-56 and 59-60 are indefinite for addition of an element in the dependent claim where the independent claim recites "consists of" the recited elements or steps. As MPEP 2111.03 [R-3] clearly states that "A claim which depends from a claim which "consists of" the recited elements or steps cannot add an element or step".

In the instant case claims 37-40 recite "The confectionary article as claimed in claim ... where the herbal mixture further consists of at least one of the herbs" (33 or 34 or 35 or 36). The independent claims 33-36, from which claims 37-40 depend from recite the term "consisting of" which makes for a closed group.

For example, claim 33 recites "confectionery article ... based on herbal mixtures, where the herbal mixtures consist of an extract of a mixture of herbs and an extract of stevia rebaudiana where the herbs are peppermint, sage, yarrow and thyme".

The transitional phrase "consisting of" excludes any element, step, or ingredient not specified in the claim. Further, a claim which depends from a claim which "consists of" the recited elements or steps cannot add an element or step (MPEP 2111.03). The recitation of "where the herbal mixture further consists of at least one of the herbs" in the dependent claim 37 constitutes addition of elements to a closed group recited in claim 33.

Similarly claims 38-40 are also indefinite for the same reasons as the independent claims 34-36 also recite closed group of herbs as done in claim 33.

Claims 43-46, 51-52, 55-56 and 59-60 are indefinite as they depend from claims 37-40.

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***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Note: Applicants' statement that "the terms "an extract of a mixture of herbs" and a "mixture of herb extract" may indeed be deemed being in some way or the other equivalent" (Remarks of 5/22/09, page 7, lines 20-24) clarifies that the two terms are substantial equivalents.

(A) Claims 33-52, and 57-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kirschner et al (US 6352713 B1), hereinafter Kirschner, in view of the

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combination of Zhao (2002/0132037), Teranishi et al (JP57068772 A, English abstract only) hereinafter Teranishi and Kano et al (JP 09194370 A, English abstract and machine translation), hereinafter Kano.

Regarding invention as claimed in claims 33 and 34, Kirschner teaches a product that may be a confectionary article (Column 8, lines 59 to Column 9, line 1) in a non liquid form (Column 8, lines 59-60) based on herbal mixtures comprising an extract of a mixture of herbs, or a mixture of herb extracts (Column 13, lines 54-57) wherein the herbs are peppermint, sage, yarrow and thyme (Column 13, lines 24-54).

Kirschner also discloses that the confectionery article may include sweetener (Column 13, lines 63 and Column 14, lines 14-20), however, Kirschner does not disclose "an extract of *Stevia rebaudiana*" as sweetener. Extract of *stevia rebaudiana* was known in the art as a sweetening agent at the time of the invention. Zhao teaches of a sweetening composition comprising an extract of *Stevia rebaudiana* for confectionary articles (page 1, paragraph 0014, last sentence and paragraph 0019; also page 2, paragraph 0021). Teranishi English abstract discloses application of water extract of *stevia rebaudiana* to flavor carbonated water. Further, Kano abstract discloses addition of extract of *stevia* to obtain good tasting sweet flavor without increasing calories in the food or beverage product (see English abstract and translation paragraph [0006]). Thus, the use of extract of *stevia rebaudiana* was known to be added to solid and liquid food items for sweetness and other associated flavor benefits without increasing the caloric value of foods. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Kirschner such that the confectionary article also comprises an extract of *Stevia rebaudiana*. One of ordinary skill would have been motivated to modify Kirschner at least for the purpose of providing a natural sweetener that has the known benefit of providing sugar sweet taste without increasing calories and also without elevating blood glucose level (page 2, paragraph 0021, last sentence).

All limitations of claim 35 and 36 are included claims 33 and 34, except that claim 34 recites that the confectionary article in claims 35 and 36 is in "the form of syrups"

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instead of non liquid form. Zhao teaches that the sweetener composition may also be provided in a liquid form (page 2, paragraph 0023, last sentence) and given that it is well known in the art that confections comprising sweeteners can be solids (hard and soft chew) or liquids (or syrups), it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Kirschner such that the confectionary article is in the form of a syrup. One of ordinary skill would have been motivated to modify Kirschner at least for the purpose of providing the confectionary article according to consumer preference.

Regarding claims 37-40, Kirschner discloses that the confectionary article can further comprise horehound (Column 13, lines 35-39), as claimed.

Regarding claims 41-44, Kirschner teaches that the confectionary article may be in the form of a hard sweet (Column 8, lines 62-67).

Regarding claims 45-48, Kirschner teaches that the confectionary article may be in the form of solid (Column 8, lines 62-67) or compressed tablet (e.g., see column 9, lines 15-20). Note that the limitations “stamped, cast, molded, or pressed” are process limitations and hence the claim is a product by process claim. “Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.” *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985).

Regarding claims 49-52, Kirschner teaches that the confectionary article may be in the form of a chewing sweet (Column 8, lines 62-67).



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Regarding claims 57-60, Kirschner teaches that the confectionary article may be in the form from which instant drinks can be prepared (such as dissolvable form and quick dissolve, see Column 8, lines 62-67).

(B) Claims 53-56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kirschner in view of Zhao as applied to claims 33-34 and 37-38, further in view of the Yotka et al (WO 91/03147), hereinafter Yotka.

Kirschner, Zhao, Teranishi and Kano have been relied upon to reject claims 33-34 and 37-38 as discussed above.

Regarding claims 53-56, Kirschner teaches a confection as recited in claims 33-34 and 37-38 where the confectionary article can be in the form chewable, confections (Column 8, lines 60-67 and Column 9, lines 25-35) but Kirschner is silent about the confectionary article being "a chewing gum". However, confectionary articles in the form of chewing gums with herbal extracts and stevia extracts were known at the time of the invention, as taught by Yotka (Page 1, page 5, last paragraph and claim 6). Yotka also discloses of flavoring agents including peppermint and spearmint (Page 18). Yotka also teaches of gum product with a non gum centre. Thus, chewing gum type confectionary articles with stevia rebaudiana extract and peppermint flavors were known at the time of the invention. Therefore, it would have been obvious for one of ordinary skill at the time of the invention to modify the teaching of Kirschner and make a confection with herb extracts including the extract of stevia, which in part comprises chewing gum, as taught by Yotka. One would have been motivated to do so at least for the purpose of making a chewable confection last longer by making it available in a form (i.e., chewing gum form) according to consumer preference.

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(C) Claims 61-63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oppenheimer et al (US 4980169), hereinafter Oppenheimer, in view of the combination of Teranishi (JP 57068772A), Kirschner (US 6352713 B1), and Zhao (2002/0132037),.

Regarding claim 61-63, Oppenheimer teaches a method of producing a confectionery article comprising the extract of herbs (plant extracts, Column 6, lines 10-15), with extract of Stevia rebaudiana (Column 6, line 45 as a sweetener) and processing the resultant mixture into a confectionery article of the desired form (Column 4, line 33 to Column 6, line 15) comprising flavor oils (i.e., extracts) of peppermint, sage and thyme (Column 6, lines 15-25).

Regarding the steps of mixing dried herbs and extracting or mixing the extracts of at least one herb as recited in claims 61-63 it is noted that extracts are conventionally known to be obtained from dried herbs as disclosed by Teranishi abstract, which is also as instantly claimed. Further, Kirschner and Zhao teach a confectionery product that may be a confectionery article (Column 8, lines 59 to Column 9, line 1) in a non liquid form (Column 8, lines 59-60) based on herbal mixtures comprising an extract of a mixture of herbs, or a mixture of herb extracts (Column 13, lines 54-57) wherein the herbs are peppermint, sage, yarrow and thyme (Column 13, lines 24-54) with “an extract of Stevia rebaudiana (Zhao, page 1, paragraph 0014, last sentence and paragraph 0019; also page 2, paragraph 0021). Kirschner teaches herbal extracts and combinations thereof including extracts of peppermint, sage, yarrow, and thyme as taught by Kirschner (Column 13, lines 24-57) as instantly claimed.

Regarding the thickening of the extract, as recited includes the recitation of term “if appropriate” which is considered to mean that the thickening step is optional and is treated as such.

Regarding the limitation of mixing herbs or the extract of at least one herb with extract of stevia or mixing the herbs and stevia to obtain an extract, Oppenheimer further teaches that making confections is a well known art and provides method steps for making hard, soft, chewable type confections comprising extracts from plants (herb extracts) where the sweeteners and additives are heated to reach desired consistency

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(thickening) before addition of additives, such as, flavoring including herbal extracts (Column 4, line 33 to Column 6, line 15). Oppenheimer also teaches of processing the resultant mixture of sweetener and flavor extracts into confectionery article of desired form (Column 5, lines 18-23).

Thus, methods of making confections comprising herbal extracts were known in the art at the time of invention (Oppenheimer, Kirschner). Herbs such as, peppermint, sage, thyme and yarrow were also known to be used together (Kirschner). Sweetener or extract derived from stevia was also well known as a sweetener for confections at the time of the invention (Teranishi, Zhao and Oppenheimer). Therefore, it would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention to modify Oppenheimer in view of the combination of Teranishi, Kirschner and Zhao at least for the purpose of providing a confection that contains natural herb extracts and natural sweetener extract that has the known benefit of providing sugar sweet taste without elevating blood glucose level (page 2, paragraph 0021, last sentence). One would have been further motivated to either use herbs separately or combined with stevia rebaudiana to extract flavors or use prepared extracts of herbs based on the availability of time, e.g., addition of prepared extracts will shorten the production time. One of ordinary skill in the art at the time of the invention would have been motivated to make a confection with natural extracts of herbs at least for the purpose of reducing the content of processing chemicals in the confectionery articles.

### ***Response to Arguments***

Applicant's arguments with respect to claims 33-63 dated 12/23/2009 have been considered but are moot in view of new grounds of rejection.

Applicants' arguments regarding Kirschner, Zhou and Oppenheimer have not been found persuasive.

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i) Applicants argue that “all of the cited prior art references are drawn to products that are fundamentally different from those of the present invention (Remarks, dated 12/23/09, Page 9, second last paragraph). Applicants seem to arrive at this conclusion because, “Kirschner teaches chewable prenatal nutrition supplements containing vitamin C and, optionally, folic acid, minerals, other vitamins and/or additives” (Remarks, dated 12/23/09, page 7, paragraph 3); “Zhou teaches an herbal sweetener composition which is low in calories and ideal for use as substitute for refined sugar or sucrose” (Remarks, dated 12/23/09, page 7, paragraph 4).

Applicants’ arguments against Kirschner and Zhao are not persuasive for the following reasons:

First of all, applicants are referred to the rejected claims as recited, e.g., claim 33 recites “A confectionery article in non-liquid form based on herbal mixtures consisting of an extract of a mixture of herbs and an extract of Stevia rebaudiana wherein the herbs are peppermint, sage yarrow and thyme.” (Emphasis added). Thus, the invention as claimed in a confectionery article “based on” herb extracts, where the term based on has not been defined (see 112(second paragraph) rejection above. It is noted that herbs are peppermint, sage, yarrow and thyme and an extract of Stevia rebaudiana, which is taught by the combination of references applied in the rejection of claims 33 and 34 above. The recitation of transitional phrase “based on” in claims is unclear and is interpreted as “comprising” and with that relevant prior art or combination of prior art references can be a confection which includes the recited ingredients along with other ingredients without limitation.

Secondly, in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In the instant case, **Kirschner** teaches a nutritional composition that can be a confection (Column 8, lines 59 to Column 9, line 1, see specifically, line 65 of Column 8) in a non liquid form (Column 8, lines 59-60) based on herbal mixtures comprising an

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extract of a mixture of herbs, or a mixture of herb extracts (Column 13, lines 54-57) wherein the herbs are peppermint, sage, yarrow and thyme (Column 13, lines 24-54). Thus, Kirschner teaches of the herb extracts as instantly claimed, which is also confirmed by applicants' remarks on Page 8, paragraph 2.

Regarding extract of *Stevia rebaudiana*, applicant is referred to rejection of claims 33-34 above.

ii) Applicants' argument against Oppenheimer is "Oppenheimer teaches a composition containing a volatile oil and a volatile oil-modifying agent" (*See Remarks, dated 12/23/09 page 8, last paragraph- page 9, paragraph 2*), and thus does not teach applicants' invention as claimed. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In the instant case applicants are referred to the rejection of claims 61-63 over Oppenheimer in view of the combination of Teranishi, Kirschner and Zhao above.

iii) Applicant's argue that Zhou's product can not be combined with Kirschner to render the pending claims obvious as "Zhou's product contains, as its main components, naturally occurring sugars and terpene glycosides, such as extracts form herbs, inter alia, *Stevia rebaudiana*, which are present therein, in addition to the main ingredients, viz, certain naturally occurring sugars, in an amount which is ideally just 1/25 of the main ingredients" (*See Remarks, dated 12/23/09, page 8 first paragraph*). Applicants' argument is not persuasive because first of all the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined

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teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Secondly, applicants' claim recites "A confectionery article based on ..." (emphasis added), which is a transitional phrase which has been neither defined by the claim nor by the specification, which makes claim language unclear for prior art interpretation.

Furthermore, there are no specific proportions or amounts of stevia extract recited in the claims, so the argument that amount of stevia extract as disclosed by Zhou does not meet the claim limitation is not persuasive. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., amount of stevia extract) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

iv) Applicants also argue that "These references mention certain herbs and/or *Stevia rebaudiana*, mostly only parenthetically" (Remarks, page 9, last paragraph). Applicants also argue impermissible hindsight by stating that "impermissible –retrospective view...a person skilled in the art might have come to the idea that the references cited in the outstanding office action might be regarded as relevant" (Page 10). In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Applicant is referred to the rejection of claims above for further details.

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***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JC  
Examiner  
Art Unit 1794

/Keith D. Hendricks/  
Supervisory Patent Examiner, Art Unit 1794